IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12/03/2003

CORAM

THE HON'BLE MR.JUSTICE E.PADMANABHAN

WRIT PETITION NO. 7384 OF 1998

Fenner (India) Ltd.,
P.O.Box.No.117
Madurai 625 001
rep. by its General Manager (Finance)
and Secretary Mr.C.Nagasubramaniam ..Petitioner

-Vs-

The Joint Regional Director
Sub Regional Office
Employees State Insurance Corporation
1-B Old Post Office St.,
Tallakukalm, Madurai 625 002 ..Respondents

Petition filed under Article 226 of The Constitution of India praying for the issue of a writ of Prohibition, as stated therein.

For petitioner:: Mr.S.Ravindran

For respondents: Mr.G.Desappan

:O R D E R

The writ petitioner, the management of Fenner (India) Ltd., has prayed for the issue of a writ of prohibition prohibiting the respondent from claiming interest of Rs.1,89,564/= on the belated payment of ESI contribution for the period between January 1997 and October 1997 as not maintainable in law.

2. The writ petition is pending in the stage of notice of motion. Heard Mr.S.Ravindran, learned counsel appearing for the petitioner and Mr.G.Desappan learned counsel appearing for the respondent. With the consent of counsel on either side the petition itself is taken up for final disposal.

3. The writ petitioner a company registered under the Indian Companies Act has its office at Madurai employing about 1000 workman. The petitioner's establishment is covered under the Employees State Insurance Act

and contributions both employer as well as employees used to be remitted regularly in respect of all eligible employees in time. In respect of employees who were not covered under the ESI Act, the petitioner company used to provide medical benefits.

4. By a notification dated 16.12.1996 the Government of India extended the coverage to those employees who draw wages up to 6,500/= Challenging the said notification, the Madurai Fenner (India) workers' Union, a registered Union filed W.P.No.2250 of 1997. By order dated 19.2.1997 interim injunction was granted restraining the petitioner from recovering and remitting ESI contribution from the month of January 1997. By order dated 27th October, 1997 R.Jayasimha Babu, J, dismissed the said writ petition holding thus:-

"The substantive prayer in the writ petition is to direct the respondents not to recover contribution under the ESI Act pending consideration of an application for exemption. The respondents cannot be injuncted from enforcing a valid statute. It is not the case of the petitioners that the statute is not valid. What they seek is an exemption. This implies that the statute is applicable. So long as the statute is applicable, it has to be enforced.
2. The application for exemption is a matter which has to be dealt with in accordance with law. I have no doubt that the State Government will consider it in accordance with law. The writ petition is disposed of by this order finally. WMP NO.16274 of 197 and 3748 of 1997 are dismissed."

5. In the light of the interim injunction passed on 19.2.1997 the contribution for the period from January 197 and ending with October 1997 could not be deducted and remitted to the respondent Corporation.

6. After the dismissal of the writ petition, the petitioner company remitted both employer and employees contribution amounting to Rs.31 ,37,500/= for the said period on 3.1.1998. While so, the respondent by Notice dated 17.12.1997 called upon the petitioner to pay contribution and also remit interest at the rate of 15% per annum on the contribution payable under Section 39(5) of the Act on arrears of contribution for each day of default or delay in payment of contribution. The respondent threatened the petitioner that recovery proceedings under section 45(C) to 45.1 of the Act in the event of non payment of interest. The petitioner as already pointed out, tht it has remitted the entire contribution of Rs.31,37,500/= and only in respect of the demand for interest, the petitioner raised objections. The respondent by letter dated 29.12.1997 once again demanded payment of interest.

7. As a certificate of recovery was issued the petitioner approached the respondent for waiver of interest of Rs.1,89,564/=. The petitioner also relied upon the pronouncement of Karnataka High Court and requested that it is not the default on the part of the petitioner but it is in view of the interim orders passed by this court which prohibited the petitioner from paying the contribution regularly. As the respondent declined to waive Rs.1.89 lakhs

being the claim of interest, the petitioner has approached this court.

8. According to Mr.S.Ravindran, learned counsel for the petitioner, contribution both employer and employee has to be paid simultaneously at regular interval in terms of the statutory provision and when an order of injunction is issued by this court, contribution could not be collected from the employees and as a result of which contribution could not be remitted to the respondent. By the prohibitory orders of injunction the petitioner has been restrained from deducting the contribution from the employees and as a result of which contribution could not be remitted in time. For no fault of the petitioner, the petitioner establishment is being required to remit interest.

9. Per contra, Mr.G. Desappan, learned counsel appearing for the respondent contended that the petitioner should have remitted the contribution from time to time and for the belated payment, the petitioner is liable to pay interest.

10. There is no dispute as to the orders of injunction passed by this court pending the writ petition filed by the employees Union and there is no dispute about the quantum of contribution payable both by the employer and employee and the period during which the orders of injunction was in force and as a result of which contribution could not be deducted from the employees and consequently the contribution both employer and employee could not be remitted.

11. The learned counsel for the petitioner referred to the statutory provisions namely Sections 29.31, 39, 40 and 41 of the Act and contended that the demand for interest cannot be sustained as it is illegal and it is in violation as deduction of contribution was prohibited during the material period by orders of this court. In this respect the learned counsel for the petitioner relies upon a Division Bench judgment of the Kerala High Court in Regional Director, ESI Corporation Vs. Cannanore Spinning and Weaving Mills, reported in 20 01 II LLJ page 1573, and contended that when the notification was challenged and interim injunction has been granted from deducting the employees contribution and when challenge has been turned down, it was held that the employer is not liable to pay interest.

12. The said Division Bench of Kerala High Court held thus:-

"4. There cannot be any quarrel with that proposition. The point covered by the decision cited by the counsel for the appellant is the challenge against the enhancement of electricity tariff. Consumers were really aggrieved by the notification. In such circumstances, when such consumers want to avert payment of enhanced rate by filing original petition and obtained stay and finally the original petition was dismissed upholding the amendment, casting the liability to pay the enhanced rate of tariff on the consumers together with interest, they are liable for interest from the due date. But in this case the facts are different. As per the amendment impugned in the Original Petition employees earning wages more than Rs.3000/= were brought under the coverage of the Act and they were aggrieved by the amendment, they filed

Original Petition and obtained stay order as mentioned above. In such circumstances, only when the amendment had become operative as regards the workmen concerned, the employer can pay contribution deducting it from the wages o the workmen. Then alone there arises the contribution payable by the employer. When the amendment was thus inoperative because of the stay order, the payment in terms of the amendment had not become due to be paid. Sub section (4) of Section 39 makes it clear that the contribution payable in respect of a period shall ordinarily fall due on the last day of the wage period. Thus, there is an amount of elasticity attached to the liability for payment of contribution making it clear that it will ordinarily be payable a mentioned above. When there was stay order, with regard to coverage of employees drawing wage beyond Rs.3000/= necessarily, the circumstances in the cause is fit to invoke that elasticity and to hold that in this case it was payable only on the lapse of 21 days from the day of disposal of O.P.No.2771/1997. The interest payable beyond the period had been taken care in the judgement impugned. In such circumstances, we hold that the Employees Insurance Court was perfectly justified in denying interest.
Idencial view has been taken by Karnataka High Court in 1998 (I) LLJ 841.

13. The learned counsel for the respondent relied upon the pronouncement of P.Sathasivam,J., in Ennore Foundries Ltd., Vs. Govt. of India, reported in 2000 (4) LLN 490, where the Learned Judge took the view that when once the writ petition challenging the validity of extension of coverage is dismissed, the parties should be placed back to the original position and the management is liable to pay contribution of the employer and the employees with interest. In that view, the Learned Judge directed the management to approach the Government for redressal.

14. In Union of India Vs. Murugan Talkies reported in 1996 (1) LLN 839 the Apex Court had occasion to consider an identical situation in respect of Provident Fund Contributions and held thus:-
4. ...We find that the High Court was wholly unjustified in granting the same relief to these owners/licensees. After their writ petitions were dismissed, they were to bear the liability from the date of the enforcement of the notification as held by this court. It is, therefore, necessary that from the date on which the respective owners of the theaters or the licensees, who had filed the writ petition in the High Court, are made liable to deposit their share of contribution towards provident fund account under the scheme.
5. We are issuing the order under Art.142 of the Constitution. The order of the High Court to that extent is set aside. The respondent and all the theater owners are directed to deposit their share of contribution to the provident fund account from the respective dates on which they field the writ petitions in the High Court. The Appellant should intimate all of them the date on which they had filed the writ petitions and call upon them their share of contribution."

15. The attention of this court is drawn to a judgment of the Karnataka High Court in HMT Watch Factory Vs. Employees' State Insurance Corporation and others reported in 1998 (1) LLN 922. The Karnataka High Court took the view that the Stay granted by the High Court made it impossible for the employer to collect or to remit the contributions and such belated payment

could not therefore be called willful non payment which alone attracted interest under clause (a) of sub section (5) of section 39 of the Act. The Karnataka High Court held thus:-

"9. It is sin the light of the above said provisions that the 1st respondent ESI Corporation has proceeded to recover the interest on the ground that the contributions are not paid in time. Factually, it is true that the contributions are not paid in time. The question is whether the delayed payment, on the facts and in the circumstances of this case, can be said to be failure on the part of the employer to pay within the meaning of Clause (a) of sub section (5) of Section 39 of the Act. I have extracted above the relevant portion fo the said clause (a) of sub section (5) of Section 39 of the Act. The applicability of the said provision is where the employer fails to make contributions. If such failure is on account of circumstances beyond his control or if the circumstances make it impossible for the employer to make contentions even if he wanted to do so unless he risks being hauled up for contempt of court, I am of the opinion that such failure on the part of the employer in making payment in time cannot be called a failure within the meaning of Clause (a) of Sub section (5) so as to call for levying of interest. As seen from the narration of facts made earlier, a portion of the very Notification having been stayed by the leaned Single Judge and the Division Bench, there was no enabling provision at all permitting him to make payments in respect of employees of the wage scale of Rs.1600-3000 even if he wanted to do so. It is to be remembered that it is not the employer who had questioned the validity of the Notification, but it was the Employees' Union that had approached this court. The employer had never felt shy of complying with the said Notification. It was the operation of the stay order initially by the learned Single Judge and later on by the Division Bench that made it impossible for the employer to make contributions firstly for the reason that the operation of the Notification itself had been stayed and secondly for the reason that, even if the employer had offered to pay, the ESI Corporation would not have been able to receive it without violating the order of the stay passed by the learned Single Judge. It was thus by acts of this court that the employer was prevented from making contribution in time and not because he did not want to pay the contributions. It is true, the validity of the Notification was eventually upheld and as such, the Notification was stated to have been come into effect from the date it was meant to have been brought into force. Nevertheless, there was no opportunity for the employer at all to make contribution until the date the Division Bench disposed of the appeals, because the stay order held the field throughout. Such delayed payments, for reasons of which the employer could not be held responsible at all, but on the other hand, making payment by him was impossible in the circumstances cannot be called willful nonpayment which alone attracted interest in terms of Clause (a) of Sub section (5) of section 39 of the Act. I have to, therefore, conclude that the delayed payment concerned herein was not the one that Section 39(5)(a) contemplated and as such levying of interest as per Annexure-E and proceeding to recover it in the manner as at Annexure-G cannot be legally sustainable".

16. In my considered view, the Notification extending the coverage was the subject matter of challenge and the Employee' Union secured orders of interim injunction as a result of which there could be no deduction of

employees' contributions . In s of the provisions of the Act, Contribution both employer and employee has to be paid together and it is not open to the employer to pay employees' contribution alone, nor such a contingency is permissible or contemplated in the ESI Act. It is true that the employer has not challenged the provisions of the Act, but it is he employees' Union which challenged the Notification. As a result of which the non payment during the material period cannot be considered as willful or deliberate omission but it it due to the interdiction orders passed by the courts of law. Section 39(5) of the ESI Act reads thus:-

"5(a) If any contribution payable under this Act is not paid by the Principal employer on the ate on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the regulations till the date of its actual payment:
Provided that higher interest specified in the regulations shall not exceed the lending rate of interest charged by any scheduled bank."

17. The interdiction by the orders passed by this court prohibits recover of contribution from the employees wages and as a result the provisions stands suspended and as a consequence the employer could not remit the contribution within the time prescribed under section 39(4). Such a contingency cannot be treated as a deliberate act on the part of the employer. But it was beyond his control. However, it is pointed out by Mr.G.Desappan, learned counsel for the respondents that once the writ petition stands dismissed, the parties are relegated to the original position and therefore interest has to be paid.

18. It is not as if the interest is liable to be paid for all belated payment irrespective of there being a reason or cause or not. It is not as if the employer has deducted the contributions of the employees and kept with it and it was also not possible for the employer to deduct contributions from the employees in view of the interim orders. As soon as the writ petition is dismissed, the contribution of both employer and employees has been remitted. The act of court shall not prejudice noone. There may be a justification for the petitioner moving the appropriate authority for waiver. This court is unable to share the view taken by P.Sathasivam,J., as it is not the employer herein had moved the High Court and secured interim order. The question of placing the parties to the original position may not arise at all as the petitioner has not moved this court and secured interim orders.

19. It is the interim orders passed by this court has disabled the employer from deducting the contribution. Therefore, the employer was unable to pay contributions and the amount of contributions which it is liable to pay has been retained by the employer for the entire period and remitted immediately. It is true that the employer's contribution from month to month was in the hands of the employer and the employer had the benefit of such sum. Even that portion of the employer's contribution which the employer is liable to be pay from month to month could not be paid for the reasons that it could not collect the employees' contribution. It is the statutory provisoin that both employer and employees contributions have to be paid together only.

20. The employer was ready with contribution and holds reserved the sum for the purpose and for the said sum the employer should not be made liable to pay interest. Admittedly, the employer has not challenged the the Notification. However, it has been disabled from recovering the employees' contribution, and it was impossible for the employer to remit contributions during the material period. The employer was under a predicament, in that it is bound to give effect to interim orders and at the same time it is obliged to pay its contribution, which was not possible in view of the statutory provision that both contributions are to be remitted together. Therefore, it cannot be held that employer has to be mulcted with interest liability for obeying the court order and was placed in such a situation for no fault of the employer.

21. The legal maxim "actus curiae neminem gravabit" namely, an act of the court shall prejudice no man is bas3d upon justice and good sense with which serves a safe and certain guide for the administration of law. The other legal maxim "lex non cogit ad impossibilia" means the law does not compel a man to do what he cannot possibly perform.

22. In the present case, the writ petitioner management cannot possibly perform what it was expected to during the material period in view of the orders of stay secured by the employees. There is no provision to pay employer's contribution alone and contribution if any required to be paid should be both employer as well as employees. What was being impossible for the employer was, namely, the remittance of the contribution has been rendered impossible at least for the interregnum period and for which the petitioner shall not be punished. It is not as if the petitioner has filed the writ petition and secured orders of stay. On the other hand it is the employees who filed the writ petition and secured orders of stay, which totally disabled the petitioner from collecting the contribution from the employees and remitting the contributions payable by the petitioner. Therefore for no fault of his, the petitioner, could be fastened with liability to pay interest.

23. In the present case the petitioner has remitted the entire arrears of contribution immediately after disposal of the writ petition and what is sought to be resisted by the petitioner is the demand for interest for the belated remission as the employer has delayed the payment deliberately. In Mohammed Gazi Vs. State of Madhya Pradesh, reported in 2000 (4) SCC 342, it was pointed out by their Lordships that on account of the pendency of the writ petition filed by another party and when stay orders were granted, the other party cannot be fastened with liability. In that context, the Supreme Court held thus:-

"7. In the facts and circumstances of the case, the maxim of equity, namely, actus curiae neminem gravabit - an act of the court shall prejudice no man, shall be applicable. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other maxim is, lex non cogit ad impossibilia - the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that

general exception in the consideration of particular cases. The applicability of the aforesaid maxims has been approved by this Court in Raj Kumar Dey v. Tarapada Dey and Gursharan Singh v. New Delhi Municipal Committee."

24. In Rajkumar Dey Vs. Tarapad Dey, reported in 1987 (4) SCC 398 the Apex Court while noting the fact that on the facts of the said case there was a subsisting injunction preventing further proceedings or for taking steps, held thus:-

"6. We have to bear in mind two maxims of equity which are well settled, namely, actus curiae neminem gravabit - An act of the Court shall prejudice no man. In Broom's Legal Maxims, 10th edition, 1939 at page 73 this maxim is explained that this maxim was founded upon justice and good sense: and afforded a safe and certain guide for the administration of the law. The above maxim should, however, be applied with caution. The other maxim is lex non cogit ad impossibilia (Broom's Legal Maxims - page 162) - The law does not compel a man to do that which he cannot possibly perform. The law itself and the administration of it, said Sir W. Scott, with reference to an alleged infraction of the revenue laws, must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases."

25. In Food Corporation of India Ltd., Vs. State of Harayana, reported in 2000 (3) SCC 495 a Three Judges Bench of the Apex Court while taking note of the fact that when the Act was invalidated by the High Court Judgement, but it was subsequently reversed by the Supreme Court and the liability to pay arises after the judgement of the Supreme Court and therefore the demand made or claim made for interest on belated payment of tax, it was held that such a demand cannot be sustained. In this respect, the Apex Court held thus:-

"10. ....There is no doubt that by the judgment of this Court, the right of the State of Haryana to collect sales tax would date back to 1 975 but that is not the same as saying that during the said period when the law was adverse to the State of Haryana it could still have made a legitimate demand, because, as stated above, during the period between 1975-77, the State's authority to make a demand was eclipsed because of the law declared by the High Court. The declaration of law made by this Court now empowers the State to raise a demand even for Assessment Year 1975-76 and the appellant is bound to satisfy the said demand, but the duty of the assessee to satisfy that demand would arise only when a fresh and valid demand after the judgment of this Court is made by the State...."

26. In Style (Dress Land) Vs. Union Territory of Chandigarh, reported in 1999 (7) SCC 89, the Apex Court while pointing out that it is settled principle of law that when a party applies and obtains a stay from the court of law, it is always at his own risk and responsibility and therefore there could be a direction for the payment of interest on the amount of arrears payable when the stay order was obtained and till the writ petition

was dismissed. In that case it was highlighted that if the party has moved the court, and secured orders of stay, then the consequences has to be indicated. But in the present case, the petitioner has not moved for stay, nor has filed the petition. But the employees have filed the petition and obtained interim orders of stay. The Apex Court in the above pronouncement held thus:-

"15. Regarding awarding of the interest by the High Court for the period of stay it is argued that as in Sahib Singh case no such direction was issued, the appellants could not be burdened with the liability of paying the interest and that at the rate of 18% per annum it was excessive and exorbitant. It is a settled principle of law that as and when a party applies and obtains a stay from the court of law, it is always at the risk and responsibility of the party applying. Mere passing of an order of stay cannot be presumed to be the conferment of any additional right upon the litigating party. This Court in Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn. held that the said portion of order by the Court means only that such order would not be operative from the date of its passing. The order would not mean that the order stayed had been wiped out from existence. The order of stay granted pending disposal of a case comes to an end with the dismissal of a substantive proceeding and it is the duty of the court in such cases to put the parties in the same position they would have been but for the interim orders of the court. Again in Kanoria Chemicals and Industries Ltd. v. U.P. SEB the Court held that the grant of stay had not the effect of relieving the litigants of their obligation to pay late payment with interest on the amount withheld by them when the writ petition was dismissed ultimately. Holding otherwise would be against public policy and the interests of justice. In Kashyap Zip Industries v. Union of India interest was awarded to the Revenue for the duration of stay under the Court□s order, since the petitioners therein were found to have the benefit of keeping back the payment of duty under orders of the Court."

27. If the view taken in the above pronouncements are applied, then it is only the employees who have secured the orders of stay have to pay the interest and not the employer who was ready to pay the contributions and who had not moved for orders of stay. That apart, the employer had immediately after the disposal of the writ petition remitted the contribution in its entirety without delay. The delay in remittance was caused by employees who moved the writ petition secured stay and enjoyed the benefit. Therefore, it is the writ petitioner/employees who should be if at all, made liable for the interest.

28. The latter pronouncements of the Supreme Court and in particular the equitable maxims namely "actus curiae neminem gravabit" and "lex non cogit ad impossibilia" was not brought to the notice of P. Sathasivam,J., and in the light of the binding pronouncement of the Apex Court, this Court is of the considered view that it is not necessary to refer the matter to a Division Bench.

29. In the circumstances, this court allows the writ petition as prayed for and makes it clear that it is open to the respondent-ESI to

initiate action for recovery of interest from the hands of the employees, who secured orders of stay and who enjoyed the benefit and disabled the petitioner from paying the contributions for the period in question. It is open to the respondent to take such appropriate action as against the employees for recovery of interest for the belated payments after issue of show cause notice, determine their liability to pay interest and pass orders. However, the said orders could be enforced through employer by deduction/recovery from salary. Since the court intervened and granted interim stay, the respondent shall not be prejudiced by interim orders and the parties should be put back to the original position before the grant of stay. This would require that the respondent has to proceed against the employees who are liable to pay contribution, and pass appropriate orders directing the employer to recover interest from such employer for the belated payment and remit the same. It is the Employees Union which moved the earlier Writ Petition for the benefit of employees who enjoyed the benefit of stay and hence if at all they should be made liable to pay interest and not the employer.

30. The writ petition as prayed for is allowed and it is open to the third respondent to take appropriate action as against the individual employees who enjoyed the benefit of stay order passed pending W.P.No.2250 of 1997. No costs.

Internet:yes
Index:yes
gkv
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To

The Joint Regional Director
Sub Regional Office
Employees State Insurance Corporation
1-B Old Post Office St.,
Tallakukalm, Madurai 625 002